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IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS M. STUBBS, AS TRUSTEE IN BANKRUPTCY OF AMERICAN BOND & SHARE CORPORATION,
Petitioner,

—vs—

THE FULTON NATIONAL BANK OF ATLANTA,
Respondent.

NO. 1205

PETITION FOR CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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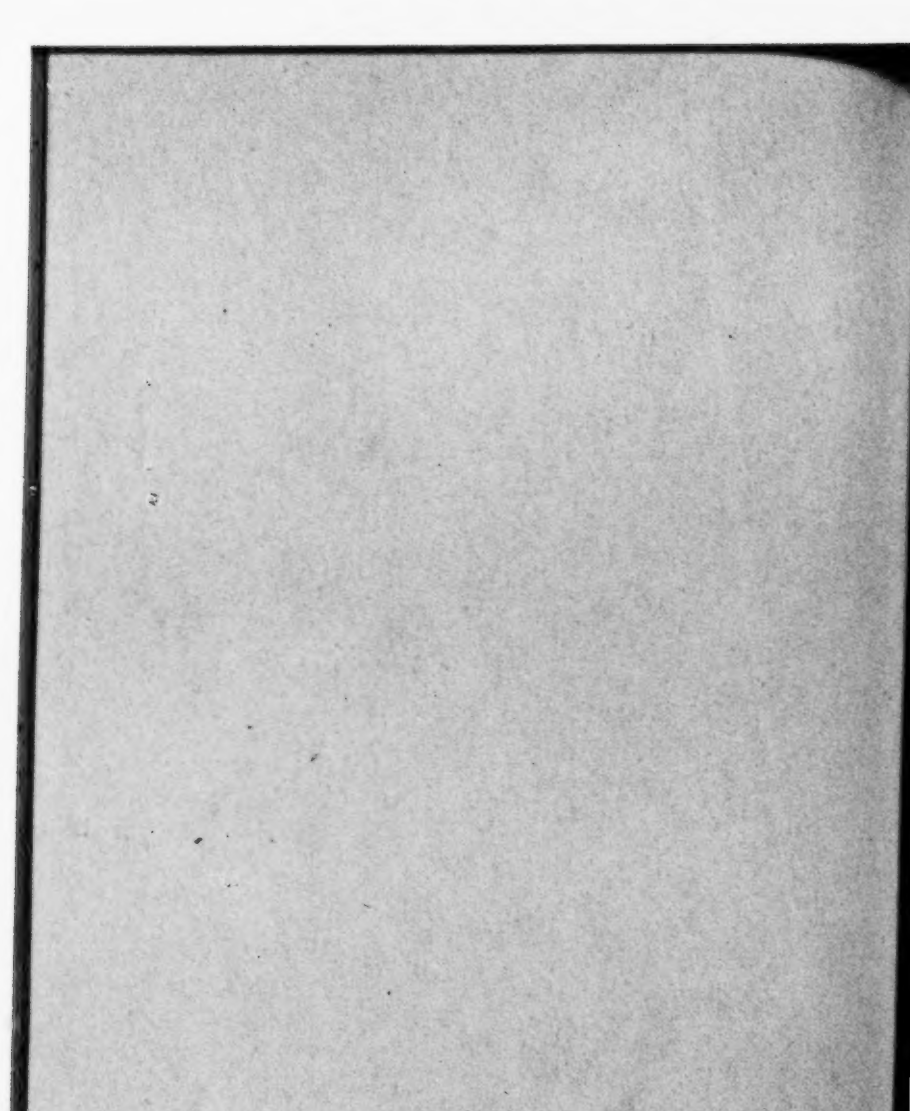
DAILY - ATLANTA



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The petition for certiorari does not make out a case for granting the writ because:

(1) The question stated as being presented is not in fact presented under the record in this case and was not in fact passed on by the Circuit Court of Appeals.

(2) The question actually dealt with by the Court at the point to which the petition for certiorari is directed was not a question of law at all, but a question of fact based on a lengthy record presenting many other features necessary for consideration in this connection and not referred to in the petition for certiorari.

(3) No question of public importance is involved.

(4) No conflict with other Circuit Court of Appeals is involved. The cases from other Circuits cited as involving a conflict are not in point.

(5) No question of federal law is involved. The petition itself shows that the sole question is the application of Georgia statutes to the facts of the particular case.

It is not necessary to discuss each of these propositions separately. It is merely necessary to get before the Court an accurate and at least fairly adequate statement with regard to the present case.

This is a suit attacking certain transfers by the bankrupt to the bank as having been made to defraud creditors. There were no ultimate issues in the case except whether these transfers were made to defraud creditors and under such circumstances that they could be set aside. The transfers were made in connection with loans currently extended. The issue arose out of the following:

The bankrupt was conducting a business of soliciting funds of customers to be used in trading on the market. These funds were delivered to the bankrupt under a series of written agreements which authorized the bankrupt to merge the different deposits, to trade at its discretion with the funds and securities deposited, to conduct this trading in its own name or in any other name which it might desire, and to borrow on the assets thus used in trading. These documents are very lengthy and are not here quoted. They were so construed by the Court (R. p. 976-977) and this construction is not questioned.

The bankrupt actually conducted these trading operations at various brokerage accounts in the City of Atlanta, particularly with Livingston and Company, Courts and Company, and Beer and Company. Under

the authority given to the bankrupt to conduct such trading accounts in other names than that of the bankrupt, accounts were carried in the name of the bankrupt and in the name of B. R. Bradley and in the name of J. S. Hearn.

At the time the loans were made by the bank which are attacked in this case, the bankrupt's business of soliciting customers had attracted a large following and the general belief throughout the community was that the business was being conducted successfully in behalf of customers. While it developed after the bankruptcy that this was not the case, there is no suggestion in the record that at the time the loans were made the bank had any reason to believe that the trading was not successful, although a bank official stated on the stand that while he believed the business was successful and while he had no knowledge that its profits were not as large as the bankrupt claimed, he was skeptical about the actual amount of profits.

In this situation the bankrupt applied to the bank for certain loans for trading purposes. Six loans over a few months were made and paid off and collateral returned, the loans with minor exceptions being made on listed collateral in street names properly endorsed. The aggregate of these loans over the period involved was $120,297.72. The actual disposition of the proceeds of these loans was traced during the trial of this case. The disposition was as follows: $86,675.92 was used by the bankrupt to pay debit balances against its trading accounts at Livingston and Company against the same securities which were put up as collateral at the bank. $3,800.00 was used to pay similar debit balances against the bankrupt's trading account at Courts and Company. $6,000.00 was used to pay a debit balance against the bankrupt's trading account at Livingston and Company in the name of Hearn. $1,800.00 was used for the Livingston and Company account.

$9,186.55 from later notes was used in making payments on earlier notes. Thus all of the proceeds of these notes were traced into the actual trading which was the bankrupt's business, except the relative small amount in the light of the total, of $9,335.25. This amount was untraced for lack of records. There is no suggestion in the evidence that it was used for any other purpose than the business of the bankrupt (R. 183, Exhibit A. This Exhibit adopted by master, R. 222).

As the Circuit Court of Appeals points out (R. p. 983) Bradley, as manager, was, by the series of contracts heretofore pointed out, authorized to have complete possession and control of all securities and funds of the bankrupt, including all left with it by its customers. The securities which were transferred to the bank were under the complete control of Bradley in this capacity at the time of the transfer to the bank. When the notes were paid off they were returned by the bank to Bradley, who was by these contracts authorized to receive them and were thus restored to the exact status in which they had been placed before the transfers to the bank as collateral were made. There was no other place where the bank could return those securities. As the Circuit Court of Appeals points out (R. p. 983) this constituted a complete restoration of the status of the transferred property and as a matter of law a complete defense. This is not referred to in the petition for certiorari.

We, however, undertook to trace what Bradley did with the securities. The total value of securities which were at one time or another placed with the bank is set out as $160,347.46. The evidence shows without dispute that of this amount, after the notes were paid and the securities returned to Bradley, he placed $144,-028.48 of securities in the trading accounts with brokers in Atlanta where the bankrupt's trading was conducted. This is exactly where they had been before

they were placed with the bank temporarily as collateral. Securities amounting to $8,115.00 were returned to customers. The evidence does not disclose the ultimate disposition by Bradley of $8,203.98 of securities. (R. 950. The exhibit there set out not in dispute.)

Thus the proof shows without dispute that the loans made by the bank were practically in their entirety used for the trading purposes for which the bankrupt was in business and that the securities transferred to the bank were, after the loans were paid, returned to Bradley and by him put back into the trading operations. To a very slight extent, in proportion to the whole, the tracing was not complete but to a slight extent only, and as to that there was no evidence suggesting an improper use of the funds or securities. The primary defense therefore of the bank throughout is and has been that, regardless of what misconduct may be charged to the bankrupt in other matters, as was only disclosed by events occurring long after these loans were made, the undisputed evidence shows the particular transactions with the bank were not made with a purpose to defraud creditors and did not in anywise deplete the assets of the bankrupt. As to this the evidence is without dispute and all of this is clearly recognized in the Circuit Court of Appeals' decision.

Indeed it has never been seriously contended in this case that the transfers to the bank did deplete in any way the assets of the bankrupt.*

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* *1 Glenn, Fraudulent Conveyances and Preferences 348:*

"The real test of a fraudulent conveyance, on the contrary, is the unjust diminution of the debtor's estate."

27 C. J. 469:

"In order that a conveyance or transfer may be attacked as being fraudulent and void as to creditors, it is necessary, even where there is an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom."

24 Am. Jur. 166:

"A very general test or criterion as to the character of a con-

In the light of the foregoing, we may now briefly examine petitioner's statement of what is claimed to be the question in the case. We first note that the petitioner's reference in this statement of the supposed question to "a national bank, which assists in financing" is totally misleading as applied to the relation of the bank here to the bankrupt. In a very general sense, any bank which lends anyone money can loosely be spoken of as assisting that person in financing, but no court has ever supposed that by doing so the bank thereby assumed responsibility for what its customer was doing. To accept such a duty would hold the bank liable for the activities of any customer to whom it lent any money. The mental picture created by the petitioner's expression of "a national bank, which assists in financing the operations" is that of a bank cooperating far beyond merely making a few current loans on listed collateral and is not justified by anything in the record.

The basic error in the petitioner's statement of the supposed question is that when speaking of fraud petitioner in no way limits the issue to an intent to defraud *in the transfers to the bank which are attacked in this suit;* and unless so limited the question actually involved is totally missed. It is not here a question of whether the bankrupt's misrepresentation to its customers of its profits was such misrepresentation as

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veyance or transfer by a debtor is whether it operates to diminish his assets."

Space does not permit a review of decisions. They support the statements in the above texts.

No injury to creditors results where, as here, the proceeds of the loans made on the transferred securities are used to pay debts of the debtor and put into his business operations and the collateral returned.

The Master here made a finding that it was "immaterial" whether creditors were injured by the transfers attacked in this case. (R. 138). He also recorded in his report that he was shocked at the injustice of his own conclusions. (R. 136). It is not surprising, therefore, that his conclusions were not sustained.

would render the bankrupt liable to customers or subject to discipline by the Securities and Exchange Commission. Of course such misrepresentation would have these consequences. No one has ever claimed the contrary and certainly the Circuit Court of Appeals meant nothing to the contrary.

The question here is whether a doubt on the part of a bank officer that the bankrupt was correctly stating its earnings was sufficient to carry to the bank notice that *the particular transactions with the bank*, which were normal loans to carry on the bankrupt's business, were transfers to hinder, delay and defraud creditors. This is a different question from the one propounded by the petition for certiorari. It deals, as it should deal, with the *question of fraud in the particular transactions involved*. That, of course, is what the Circuit Court of Appeals was considering. Its language must be construed in the light of the issue actually before it and of the case actually being decided. So construed the language seems to us clear; but in any event the ruling is clear, and the pressure on this Court's time is much too great to justify the granting of a writ because of criticism of the language used by a Circuit Court of Appeals in expressing a correct result.

Judge Lee's opinion makes it clear that what he was dealing with at this point was whether the fact that a bank official doubted that the earnings had been correctly stated was sufficient to charge the bank with knowledge "that the transfers were made for the purpose of defrauding creditors" (R. 980). It cannot therefore be treated, as the petition for certiorari suggests, as conflicting with rulings that misrepresentation as to earnings would justify action by the Securities and Exchange Commission or criminal prosecution if the mails were used; hence there is no conflict with the decisions of other circuits cited by petitioner.

Since we are here dealing with a case charging transfers with intent to hinder, delay and defraud creditors,

the question before the Circuit Court of Appeals is one that cannot be answered as an abstract question of law, but is a question of fact to be considered in the light of the whole record in the case. That record is in two volumes. Any attempt to summarize the evidence at this point would expand this brief beyond reasonable limits. The writ of certiorari is not intended to be used to bring before the court factual questions involving elaborate studies of long records where the question though of importance to the parties is not of importance to anyone else.

While no effort is made to summarize the proof, we do point out that the facts stated in the opinion of the Circuit Court of Appeals are fully sustained by uncontradicted proof and show among other things that the transfers were not made with any intent to defraud creditors and did not in fact defraud creditors since they did not deplete the bankrupt's assets or withdraw any assets from the reach of creditors. This alone is sufficient to sustain the court's conclusion that the statement of the bank officer that he was skeptical about the amount of profits, though he had no knowledge on the subject, was not enough under this record to invalidate such transfers to the bank on the charge that they were made with intent to defraud creditors.

Respectfully submitted,

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